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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/035,208	01/04/2002	Laure Thiebaut	05725.1002-00	3461

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EXAMINER

COMSTOCK, DAVID C

ART UNIT	PAPER NUMBER
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3732

DATE MAILED: 04/03/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/035,208

Applicant(s)

THIEBAUT, LAURE

Examiner

David C. Comstock

Art Unit

3732

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-37 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-37 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 04 January 2002 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 1.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### *Claim Rejections - 35 USC § 102*

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-10, 12-14, 18-27, 29, and 32-36 are rejected under 35 U.S.C. 102(b) as being anticipated by Kim (4,615,635).

Kim discloses a brush comprising a compressible container 4, an applicator head 2 having a plurality of applicator elements 12. The applicator head includes an opening 48 that is closer to the base of the applicator elements than to the ends thereof. The applicator head includes a movable support 52. Some of the applicator elements are mounted on the movable support (see Fig. 4). The applicator elements are arranged in rows. When the support is in a second position, the opening is outside a mean plane containing the two rows of applicator elements along the edges. A first row of applicator elements is mounted to the movable support and moves relative to a second row of applicator elements. Some of the elements of the first row are shorter than those of the second row. The opening is to the side of and between two outer rows. The device includes rows with identical length elements in a row. The end wall of the container, like the remainder of the container, comprises a handle, i.e. it is capable of being grasped by a user. The applicator is removably mounted on the container and includes a sealing

member in the form of a bulge 54 that locks in the opening comprising an indent to lock the bulge therein. The support is slidably mounted. The device is used by passing product to the head of the user, i.e. the teeth, via the opening after sliding the support to an open position. The opening is closed after use. (See Figs. 2, 4, 5, and 7 and col. 6, lines 43-47.)

Claims 1, 2, 12, 14, 15, 18-20, 26, 27, 29, 30, 32, 34-37 are rejected under 35 U.S.C. 102(b) as being anticipated by Henk (EP-276-713-A).

Henk discloses a hair dye applicator comprising a compressible, resilient container 5, an applicator head having a plurality of applicator elements 22 on a movable support 2, and an opening 13 adjacent the base of the applicator elements. Some of the elements are in a row and have identical length. The entire container, including the end wall, comprises a handle, i.e., capable of being grasped by a user. The applicator is removably mounted to the container. The movable support rotationally slides on the device to open. A hair dye product is contained in the container. The device is used by sliding the device to an open position to apply dye to the hair of a user and then closing the device. (See Figs. 2 and 3 and Abstract.)

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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Claims 1-3, 9, 12, 14, 15, 18-21, 27, 29, 30, and 32-37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Di Vito (2,897,826) in view of Donley et al. (4,090,522; cited by applicant on PTO-1449).

Di Vito discloses a dye applicator comprising a compressible, resilient container 10, an applicator head with a plurality of teeth 18 thereon. The device includes openings 20 out of the plane of the teeth. The opening are adjacent the base of the teeth. The teeth are in a row. The openings are to one side of the row of teeth. The teeth are of identical length. The entire container including the end wall comprises a handle, i.e., it is capable of being grasped by a user. The applicator is removably mounted to the container. The container contains hair dye. (See Figs. 1 and 2 and col. 1, lines 15-21 and 41-50.) Di Vito does not disclose a movable support with the teeth mounted thereon. Donley et al. disclose a similar device having teeth 20 mounted to a movable support 18 to provide a closure that prevents any leaking from the container while not in use and improve the reliability and convenience of the device (see Fig. 3 and col. 2, lines 9-11). It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the applicator of Di Vito with a movable support to which the teeth are mounted, in view of Donley et al., in order to provide a closure that prevents any leaking from the container while not in use and improve the reliability and convenience of the device. With regard to claims 16 and 17, it also would have been obvious to form the device of polyethylene, PVC, or Aluminum (EVOH) polyethylene, a low or very low density polyethylene, or any like material, since it has been held to be within the general skill of a worker in the art to select a known material

on the basis of its suitability for the intended use as a matter of obvious design choice.

*In re Leshin*, 125 USPQ 416.

Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Kim (4,615,635).

Kim discloses the claimed invention except for showing the slot. Slots are functionally equivalent aperture configurations known in the art. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to construct the aperture of Kim as a slot as such merely constitutes substitution of functionally equivalent aperture configurations. Moreover, a slot is nothing more than one of numerous shapes or configurations a person of ordinary skill in the art would find obvious. *In re Dailey and Eilers*, 149 USPQ 47 (1966).

Claim 28 is rejected under 35 U.S.C. 103(a) as being unpatentable over Henk (EP-276-713-A) in view of Magharehi (5,937,866).

Henk discloses the claimed invention except for the lid. Magharehi discloses a dye applicator having a lid 43 to prevent the dye from drying out and oxidizing and to protect the user from unintended application to hands or clothing (see Fig. 1 and col. 3, lines 22-31). It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the applicator of Henk with a lid, in view of Magharehi, in order to prevent the dye from drying out and oxidizing and to protect the user from unintended application to hands or clothing.

Claim 31 is rejected under 35 U.S.C. 103(a) as being unpatentable over Henk (EP-276-713-A).

Henk discloses the claimed invention except for the dye product comprising a gel, cream, or paste. Gels, creams, pastes, and other various forms of dyes are functionally equivalent hair dye forms known in the art. Therefore, because these were simply art-recognized equivalents at the time the invention was made, one of ordinary skill in the art would have found it obvious to substitute gels, creams, or pastes, for liquid dyes. Moreover it is noted that it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416.


### **Conclusion**

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to David C. Comstock whose telephone number is (703) 308-8514.



D.C. Comstock  
March 28, 2003



**EDUARDO C. ROBERT**  
**PRIMARY EXAMINER**